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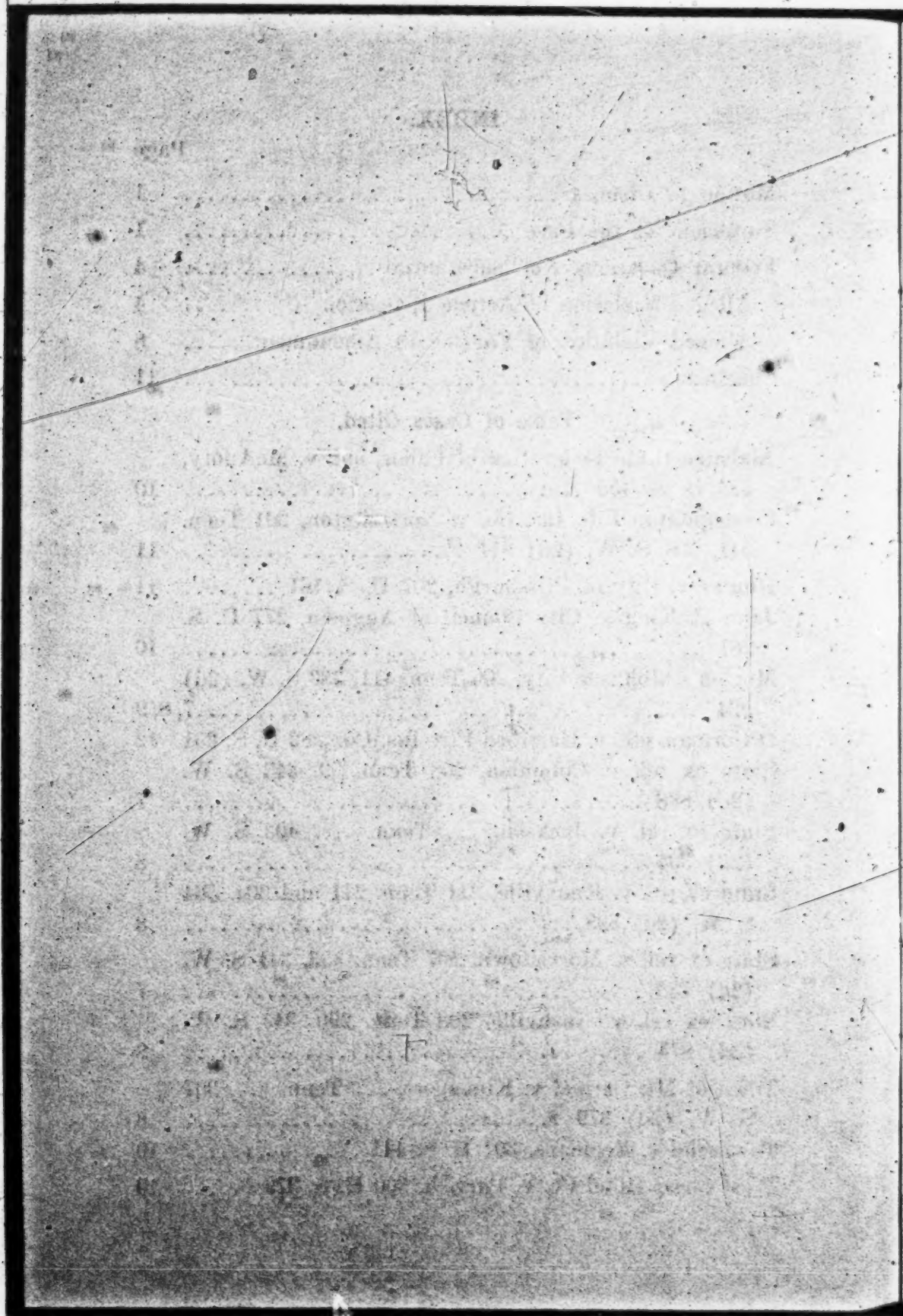

No. 1182.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

STATE OF TENNESSEE, Ex Rel., Etc.,
Appellants,

vs.

CITY OF CLARKSVILLE, et al.,
Appellees.

On Appeal from Supreme Court of the State of Tennessee.

APPELLEES' MOTION TO DISMISS.

Appellees move the Court, pursuant to its Rule 161 (b), to dismiss the appeal because it does not present a substantial federal question.

STATEMENT OF THE CASE.

Lying south of Fort Campbell and immediately north of, and contiguous to, the City of Clarksville, Tennessee, is an unincorporated area of approximately ten square miles known as the New Providence Area. It is estimated that between eight thousand and nine thousand people reside in the area, devoted to residential, farming

and industrial uses; and many subdivisions are being developed in it. Appendix B, pp. 28-29.*

Since World War II Clarksville and the adjacent areas have experienced a phenomenal growth, and this is especially true of the New Providence area. In recent years, the area has become urban in nature. To meet some of the problems presented by this growth of population, utility districts have been formed to provide electric and water services. Within the corporate limits of the City of Clarksville there has also been a tremendous industrial and population growth, and any future growth of the City must be beyond its present city limits. Appendix A, p. 16.

The area has been the subject of two annexation studies in February, 1960, and October, 1964, both of which resulted in recommendations for annexation to the City of Clarksville. These studies included analysis of the service needs of the area as to water, sewage, gas, electricity, fire and police protection, street lighting, parks or recreational grounds, traffic control, zoning, governmental administration, and school services.

A plan of services made by experts employed by the City to make the study and to prepare a proposed plan of services was filed with the City of Clarksville in October, 1964. The report and plan of services were referred to the Regional Planning Commission and after review and analysis that body unanimously recommended the plan to the City Council.

A public hearing with respect to the proposed annexation was held by the City Council after published notice of the hearing at which advocates and opponents of annexation could express their views. Appendix B, pp. 29-30.

* All references to the Appendix are to the Appendices to the Jurisdictional Statement.

An ordinance annexing the New Providence area to the City of Clarksville was finally adopted in December, 1964. Appendix E, p. 41.

A statute of Tennessee relating to annexation of adjacent territory by a municipality provides that it may so annex upon its own initiative, when it appears that the prosperity of the city and the territory will be materially retarded and the safety and welfare of the inhabitants and property endangered. No favorable vote by the electorate of the area to be annexed is contemplated or required. The statute does require that there be a public hearing after notice and that prior to annexation the governing body of the city must adopt a plan of services setting forth the identification and projected timing of municipal services proposed to be extended into the territory. Appendix F, p. 46, Tennessee Code Annotated, Section 6-309.

The procedure required by the annexation statute was followed by the City of Clarksville in passing the challenged ordinance. Appendix A, p. 20.

The annexation statute further provides that any aggrieved owner of property in the annexed area may contest the validity of the annexation ordinance by suit filed within thirty days, and to facilitate judicial review, the statute further provides that the ordinance shall not become operative for thirty days after final passage. If a contest is duly filed, the annexation ordinance remains inoperative until the case is decided, including any appeal to the Supreme Court of Tennessee. Appendix F, p. 46, Tennessee Code Annotated, Sections 6-309 and 6-310.

Thus the annexation ordinance remained inoperative from its final passage in December, 1964, until after the Supreme Court of Tennessee denied petition to rehear on December 20, 1966. Within seven days after denial of said petition to rehear, contestants gave notice of appeal to this

Court and on January 3, 1967, a Judge of the Tennessee Supreme Court denied a motion to stay the judgment. Appendix D, p. 39.

No evidence was offered in the trial court with respect to any violation of Article I, Section 10 or the Fourteenth Amendment to the Constitution of the United States; there is no such evidence in the record here. However, there were literally hundreds of pages of evidence to show why annexation was necessary to promote the welfare of the annexed area and of the City. Appellants did not see fit to bring the evidence up as a part of the record in this Court, and not conceiving it to be the duty of the City by affirmative evidence to show that the ordinance was desirable, appellees have not made such evidence a part of the record. Hence, this case is here only upon the pleadings, the opinions and decrees entered below.

No question with respect to constitutional violations was raised by brief or argument in the trial court or by brief or argument in the Supreme Court of Tennessee; and, therefore, no such question is mentioned in the opinions of the trial court or of the Tennessee Supreme Court. Actually, the questions of constitutionality were raised for the first time by petition to rehear in the Tennessee Supreme Court, without explanation, citation of authority or supporting argument. Such questions were raised by the bare allegation of said constitutional violations. The opinion on petition to rehear responds concisely but fully to the contentions. Appendix C, p. 37.

THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL.

1. Alleged Violation of Article I, Section 10 (Impairment of Contracts).

The Jurisdictional Statement asserts that the ordinance of annexation (No. 16-1964-65) violates Article I, Section

10 of the United States Constitution. This ordinance (Appendix E) is an annexation ordinance which contains nothing operative except a simple provision by which clearly described adjacent territory is annexed to the City of Clarksville, Tennessee, and incorporated therein. The City has done nothing else because the ordinance was rendered inoperative and has been kept inoperative by litigation promptly instituted by forty-one individuals, three companies and three public utility districts and continuously carried on since annexation.

In Tennessee, a public utility district is a quasi-municipal corporation created to furnish limited and specific utility services in an otherwise unincorporated area. When an area served by one or more utility districts is annexed to a municipality, it is the duty of the city and the utility district to attempt to reach agreement for conveyance to the city of all public functions, rights, duties, property, assets and liabilities. The statute does not indicate either one or the other has the duty to initiate negotiations. The utility districts have not requested or sought such negotiations. The City has believed that its request for negotiations would be useless if made to a utility district which continues to dispute legally that the area has been annexed and when without annexation the City has no right or duty to negotiate.

Failing of agreement, the parties have a statutory obligation to arbitrate; but the statute makes clear that if the city chooses it has the exclusive right to perform utility services in the area and also that the city must assume the bonds and other obligations of the utility district and fully protect the contract rights of the holders of bonds or other obligations. Appendix F, p. 48, Tennessee Code Annotated, Section 6-318.

In the present case the City and the utility districts have not yet negotiated. They could not properly nego-

tiate, at least until after petition to rehear was denied on December 20, 1966, because as the Supreme Court of Tennessee said (Appendix B, p. 32) "a municipality does not acquire the right or duty to negotiate or arbitrate with the utility furnishing services to an area sought to be annexed to the city until the annexation of such area is completed"; and the Court again said, Appendix B, p. 34, "such negotiations would have to be made after the annexation was completed."

All that has taken place up to date is that the City has annexed a contiguous area to the municipality. Any argument that the City may by some future action impair the rights of bondholders or other creditors of the utility districts is pure speculation and surmise. If the City at some future date should attempt any such thing, those aggrieved would have their judicial remedy then. The annexation statute expressly provides for the full preservation and protection of the contract rights vested in the holders of such outstanding bonds or other obligations. Appendix F, Tennessee Code Annotated, Section 6-318. It is not to be presumed in the absence of any evidence whatever that the City officials will attempt to violate their statutory duty, and if they do so a judicial remedy may then be applied for. The fact of annexation does not prevent or interfere with that remedy if the future so develops as to require it.

The contention that somehow contract rights have been impaired by a simple statute of annexation is conjectural and speculative. The City of Clarksville, if it chooses, may elect not to exercise the exclusive right to perform utility functions and the utility districts by contract with the City or by sufferance of the City, may continue indefinitely to perform such services, to receive their full and regular service fees therefor and to pay all their bonds and other obligations. What then becomes of the conjectural argument that there "has been" an impairment of the obligation of contracts?

The City of Clarksville may also elect (and probably will do so as its plan of services contemplates) to initiate proceedings to acquire the New Providence Utility District by negotiation, arbitration or judicial proceedings. By any method of acquisition the City must protect the contract rights vested in holders of outstanding bonds or other obligations. Appendix F, Tennessee Code Annotated, Section 6-318. If the City acquires the rights, duties, assets and liabilities of such utility district by agreement between the parties approved by a court of record or by judicial decree transferring such rights, duties, assets and liabilities, what then becomes of the argument about impairment of contracts?

Thus the only two alternatives available to the City of Clarksville leave the contract rights of creditors of the utility districts completely untouched, as the trial court contemplated, Appendix A, p. 25, and as the Tennessee Supreme Court expressly stated, Appendix B, pp. 30-31, and Appendix C, p. 37. The two utility districts, other than the New Providence Utility District, are situated mainly without the annexed area and partly within it. Doubtless for this reason the plan of services made no mention of them but left to future decision the matter of their acquisition. Again, however, the City must either leave them undisturbed in their operations or by negotiation, arbitration or judicial decree have the rights of the parties determined. Any agreement or judicial decree changing the *status quo* must fully protect the rights of creditors, as spelled out in Appendix F, Tennessee Code Annotated, Section 6-318.

This annexation is no different from many others by which cities of Tennessee have extended their boundaries. Among the cases showing this are **Morton v. Johnson City**, 206 Tenn. 411, 333 S. W. (2d) 924; **State ex rel. v. Morristown**, 207 Tenn. 593, 341 S. W. (2d) 733; **State ex**

rel. v. Columbia, 208 Tenn. 59, 343 S. W. (2d) 888; State ex rel. v. Nashville, 208 Tenn. 290, 345 S. W. (2d) 874; State ex rel. v. Knoxville, 211 Tenn. 271 and 304, 364 S. W. (2d) 898 and 912; Town of Mt. Carmel v. Kingsport, ... Tenn. ..., 397 S. W. (2d) 379; State ex rel. v. Jackson, ... Tenn. ..., 403 S. W. (2d) 304.

2. Alleged Violation of Fourteenth Amendment (Due Process of Law).

The contention that the annexation ordinance and the statute pursuant to which annexation was made deprive those holding bonds of utility districts of due process of law is also an insubstantial federal question. In the Jurisdictional Statement this contention of constitutional violation is urged only on behalf of bondholders. Incidentally, there is no evidence in the record here (nor was any such evidence offered below) that any bondholders as such was aggrieved or injured by annexation.

The argument for lack of due process is that the decisions of the Supreme Court of Tennessee impose the burden of showing that an ordinance is invalid upon the protestants, and that protestants automatically fail to carry this burden when they show only that the reasonableness or unreasonableness of the ordinance is "fairly debatable." Morton v. Johnson City, 206 Tenn. 411, and other later cases are cited by the Jurisdictional Statement.

Apparently, appellants insist that it is a violation of due process of law for a state to decline to have the courts hear evidence and decide whether the evidence preponderates for or against the desirability of the ordinance. Neither the Constitution of the United States nor the Tennessee Constitution requires this, and the annexation statute, Appendix F, as authoritatively construed in the above cited Morton case, does not require it.

The case of **Morton v. Johnson City**, 206 Tenn. 411, is the leading case in Tennessee construing this annexation statute and its principles have been adhered to in later cases. In the **Morton** case, a city annexed adjacent territory and in judicial contest of the annexation ordinance the trial court held the ordinance invalid. On appeal, the Tennessee Supreme Court reversed and sustained the ordinance. The Court's reasoning was as follows:

The Legislature has power to annex subject to constitutional limitation and this power may be delegated to municipal governing bodies, as was done by Tennessee Code Annotated, Section 6-309. When an ordinance is judicially challenged as invalid and it has been adopted in compliance with the statute, the court does not substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body. Judicial review of reasonableness is confined to a determination of whether there exists a sufficient showing of reasonableness by those defending the ordinance to make that question "at least a fairly debatable one". According to the **Morton** case, the annexation statute permits judicial review under the following principle:

> ". . . the correct legal principle to apply is what is said in the outset of this opinion, that is if it is a fairly debatable question as to whether or not the ordinance is reasonable or unreasonable the courts certainly are not going to take any hand in it one way or the other" (206 Tenn. 426).
>
> "Suffice it to say we have read this evidence pro and con and think that it is a fairly debatable question. It is so even that unquestionably the courts if they got into the matter would be getting into the legislative feature of it and not the judicial feature. When the evidence is thus evenly divided on the reasonableness or unreasonableness it is perfectly

obvious that those opposing and those in favor of, whether it is reasonable or unreasonable, are so expressing themselves in a political or a legislative matter and not in such a matter as it constitutes evidence that should or would control a judiciary" (206 Tenn. 429).

A municipal ordinance for purpose of review by this Court as to constitutionality is not different from a state statute. Appellants here ask review of the annexation ordinance under 62 Stat. 929, 28 U. S. C., Sec. 1257 (2), "where is drawn in question the validity of a statute of any state. . . ." A city ordinance is a state statute within the meaning of the quoted provision. **John P. King v. City Council of Augusta,** 277 U. S. 267. This Court accepts the state court's interpretation of a state statute and the question is whether the statute or ordinance, as construed by the state supreme court, violates the Constitution.

Where a state statute is assailed as unconstitutional this Court will assume the existence of any state of facts which would sustain the statute. **Alabama State Federation of Labor, etc. v. McAdory,** 325 U. S. 450. The presumption favors the validity of a state statute and this Court will not annul it unless it is palpably in excess of legislative power. **West Coast Hotel Co. v. Parrish,** 300 U. S. 379. Also, the legislative body acting within its sphere is presumed to know the needs of its people. **Townsend v. Yeomans,** 301 U. S. 441.

In the case at bar, the trial court and the Tennessee Supreme Court did not assume the existence of facts to sustain the statute. Evidence pro and con was offered and received as to the reasonableness of annexation. Having decided that the reasonableness of annexation was a debatable question, the court said it "cannot weigh the evidence and determine where the preponderance of

the evidence lies, but can only decide whether or not a debatable question is presented." Appendix A, p. 21. Thus the Tennessee courts gave the protestants by virtue of Tennessee Code Annotated, Section 6-310 (Appendix F) as authoritatively construed, greater rights of judicial review than they would have if the annexation had been an act of the State Legislature. In such case, the courts will not inquire into the policy of legislation, if there is a plausible reason for enacting such legislation. **Cosmopolitan Life Ins. Co. v. Northington**, 201 Tenn. 541, 300 S. W. (2d) 911.

Instead of the strict rule constitutionally permissible, the annexation statute as construed (1) requires a public hearing for those opposed to annexation; (2) requires a plan of services for the annexed area submitted to the local planning commission with written report thereon; (3) provides for suspension of the annexation ordinance if judicially challenged until the appellate court is given an opportunity on appeal to annul it; and (4) requires annulment of the ordinance if in a judicial contest there is not sufficient evidence as to reasonableness of annexation to make that question "fairly debatable."

In the Jurisdictional Statement, p. 9, it is said ". . . enlargement of cities by annexation of additional territory is exclusively a State matter . . ." This concession states an obviously correct principle in view of **Hunter v. City of Pittsburgh**, 207 U. S. 161 (1907) and many later cases. We believe this principle disposes of the present case and does not need further argument.

CONCLUSION.

In conclusion, we emphasize that appellants are not asking this Court to declare unconstitutional a statute as a violation of Article I, Section 10 (obligation of contracts clause) or of the Fourteenth Amendment (due process of

law clause) on the basis of evidence introduced at the hearing or preserved in the record before this Court. Without bringing up the evidence as part of the record, they ask such result on the basis of speculation, surmise and assumptions as to what may hereafter happen. The presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. **O'Gorman, etc. v. Hartford Fire Ins. Co.**, 282 U. S. 251. The federal questions here sought to be raised without any factual foundation are clearly not substantial.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss should be sustained.

Respectfully submitted,

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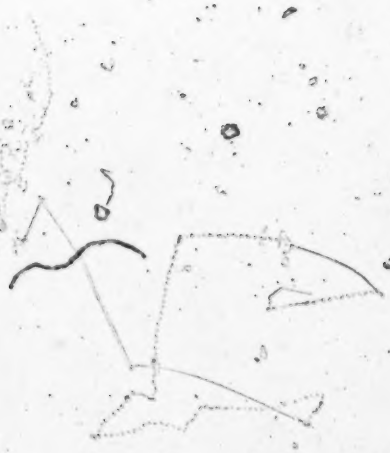

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

TENNESSEE EX REL. NEW PROVIDENCE UTILITY DISTRICT ET AL. *v.* CITY OF CLARKSVILLE ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION.

No. 1182. Decided May 22, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.